

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF NEW YORK

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TROY G.,

Plaintiff,

v.

Civil Action No.  
3:23-cv-488 (DEP)

MARTIN J. O'MALLEY,  
Commissioner of Social Security  
Administration,<sup>1</sup>

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACHMAN, GORTON LAW FIRM  
P.O. Box 89  
1500 East Main Street  
Endicott, NY 13760-0089

PETER A. GORTON, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.  
OFFICE OF GENERAL COUNSEL  
6401 Security Boulevard  
Baltimore, MD 21235

GEOFFREY M. PETERS, ESQ.

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<sup>1</sup> Plaintiff's complaint named Kilolo Kijakazi, in her official capacity as the Acting Commissioner of Social Security, as the defendant. On December 20, 2023, Martin J. O'Malley took office as the Commissioner of Social Security. He has therefore been substituted as the named defendant in this matter pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, and no further action is required in order to effectuate this change. See 42 U.S.C. § 405(g).

DAVID E. PEEBLES  
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>2</sup> Oral argument was heard in connection with those motions on May 22, 2024, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is

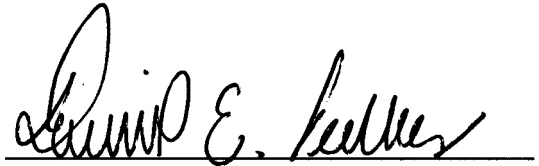
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<sup>2</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

incorporated herein by reference, it is hereby

ORDERED, as follows:

- 1) Defendant's motion for judgment on the pleadings is GRANTED.
- 2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.
- 3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", is written over a horizontal line.

David E. Peebles  
U.S. Magistrate Judge

Dated: May 29, 2024  
Syracuse, NY

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

-----x  
TROY G.,

Plaintiff,

-v-

3:23-CV-488

COMMISSIONER OF SOCIAL SECURITY,

Defendant.  
-----x

**DECISION TRANSCRIPT  
BEFORE THE HONORABLE DAVID E. PEEBLES**

May 22, 2024  
100 South Clinton Street, Syracuse, NY 13261

For the Plaintiff:

LACHMAN & GORTON LAW OFFICE  
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BY: **PETER A. GORTON, ESQ.**

For the Defendant:

SOCIAL SECURITY ADMINISTRATION  
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BY: **GEOFFREY M. PETERS, ESQ.**

*Hannah F. Cavanaugh, RPR, CRR, CSR, NYACR, NYRCR  
Official United States Court Reporter  
100 South Clinton Street  
Syracuse, New York 13261-7367  
(315) 234-8545*

1 (The Court and all parties present by telephone.  
2 Time noted: 2:20 p.m.)

3 THE COURT: Let me begin by thanking counsel for  
4 excellent presentations. You've presented me with some  
5 fascinating arguments, Attorney Gorton.

6 At the outset, let me address the issue of consent.  
7 When this case was filed, it was assigned to Magistrate Judge  
8 Hummel. The consent form that was signed on May 10, 2023, by  
9 you, Attorney Gorton, consented to Magistrate Judge Hummel.  
10 Sorry to put you on the spot, but do you consent -- it was  
11 transferred to me by our chief judge.

12 MR. GORTON: Yes.

13 THE COURT: Do you consent to my jurisdiction?

14 MR. GORTON: Yes. Win or lose, I consent. I have no  
15 clue what's going to happen, but, yes, we consent.

16 THE COURT: Well, you've never hesitated to take an  
17 appeal to the Second Circuit on the rare case when you thought I  
18 was wrong.

19 All right. So I have before me a challenge to an  
20 adverse Commissioner's determination finding that the plaintiff  
21 was not disabled at the relevant times and therefore ineligible  
22 for the disability insurance benefits sought. It is brought  
23 pursuant to 42, United States Code, Section 405(g).

24 The background is as follows: Plaintiff was born in  
25 December of 1968. He is currently 55 years old. He was

1 51 years of age at the alleged onset of disability on  
2 September 5, 2020. He stands 5'3" in height and weighs  
3 approximately 144 pounds. He lives in a house in Binghamton  
4 with two aunts, one uncle, and some pets. Plaintiff achieved a  
5 GED and, while in school, attended regular classes. Plaintiff  
6 has a driver's license and does drive.

7 Plaintiff stopped working in September of 2020.  
8 Prior to stopping, he worked in various positions, including,  
9 for a lengthy period of time, in a warehouse as both a  
10 dispatcher and a forklift operator. He held various temporary  
11 jobs at some point on a short-term basis, including as a  
12 dishwasher and prep cook. He did hospital housekeeping for  
13 approximately one year and most recently, before stopping work,  
14 worked in a warehouse processing facility for Dick's Sporting  
15 Goods.

16 Physically, plaintiff has a history of heart issues,  
17 as well as mild lumbar degenerative disc disease, diabetes,  
18 sleep apnea for which he uses a CPAP machine, some arthritis in  
19 his knees, and high cholesterol. The heart issues include from  
20 time to time going into atrial fibrillation, or AFib. He also  
21 sustained a myocardial infarction with left moderate anterior  
22 descending artery occlusion in April of 2019 resulting in  
23 catheterization. In May of 2020, he experienced a non-ST  
24 elevation myocardial infarction resulting in catheterization and  
25 he's had multiple hospital visits with AFib events. Plaintiff's

1 primary care provider is Nurse Practitioner Ryan Little who is  
2 with United Health Services Primary Care where plaintiff has  
3 treated since approximately 2005.

4 In terms of activities of daily living, plaintiff is  
5 able to clean, cook, shop, groom himself, drive, care for his  
6 pets. He reported on May 25, 2021, at page 528, walking between  
7 one and four miles at a time and riding a bicycle several miles  
8 per week. In that report, he stated that he walks four miles  
9 several times a week.

10 The procedural history is as follows: Plaintiff  
11 protectively filed a Title II application for benefits on  
12 October 2, 2020, alleging an onset date of September 5, 2020.  
13 At page 242, he alleged disability based on Type II diabetes,  
14 two prior heart attacks, AFib conditions, sleep apnea, arthritis  
15 in his knees and back, high cholesterol, hypertension, and  
16 potential gallbladder problem.

17 A hearing was conducted by Administrative Law Judge  
18 Kenneth Theurer after his claim was denied at the initial entry  
19 level. The hearing was conducted on August 6, 2021, by ALJ  
20 Theurer who then subsequently issued an adverse decision on  
21 August 16, 2021. The Social Security Administration Appeals  
22 Council denied plaintiff's application for review on  
23 February 28, 2023. This action was commenced on April 20, 2023,  
24 and is timely.

25 In his decision, ALJ Theurer applied the familiar

1 five-step sequential test for determining disability. He first  
2 noted that plaintiff is insured for benefits through  
3 December 31, 2025. He found that plaintiff had not engaged in  
4 substantial gainful activity since September 5, 2020, although  
5 he did note some earnings reflected in 2020 and 2021.

6 At step two, ALJ Theurer concluded that plaintiff  
7 does suffer from impairments that impose more than minimal  
8 limitations on his ability to perform basic work activities,  
9 including recurrent arrhythmia, history of myocardial  
10 infarction, and mild degenerative disc disease of the lumbar  
11 spine.

12 At step three, ALJ Theurer concluded that plaintiff's  
13 conditions do not meet or medically equal any of the listed  
14 presumptively disabling conditions set forth in the  
15 Commissioner's regulations, specifically considering listings  
16 1.15 and 4.05.

17 The Administrative Law Judge then concluded based on  
18 the entire record that plaintiff retains the residual functional  
19 capacity, or RFC, to perform light work as defined in the  
20 regulations, except he can never climb ladders, ropes, or  
21 scaffolds, and he can only occasionally balance, stoop, kneel,  
22 crouch, crawl, and climb ramps and stairs.

23 Applying that RFC at step four, ALJ Theurer concluded  
24 that plaintiff is unable to perform his past relevant work as a  
25 housekeeper, forklift operator, and a composite job of



1 dispatcher and warehouse worker.

2 At step five, the Administrative Law Judge, noting  
3 that the burden at that step rests with the Commissioner,  
4 concluded that plaintiff is capable, notwithstanding his  
5 limitations, of performing work as a marker, assembler and an  
6 electronics assembler based on the testimony of a vocational  
7 expert.

8 As you know, the Court's function at this juncture is  
9 extremely limited. The standard to be applied is very  
10 deferential. I must determine whether correct legal principles  
11 were applied and the resulting determination is supported by  
12 substantial evidence defined as such admissible evidence as a  
13 reasonable mind would find sufficient to support a conclusion.

14 The Second Circuit Court of Appeals has noted,  
15 including in *Brault v. Social Security Administration*  
16 *Commissioner*, 683 F.3d 443, that the standard is extremely  
17 deferential. It is even more rigorous than the clearly  
18 erroneous standard. The Second Circuit has more recently  
19 reiterated this in *Schillo v. Kijakazi*, 31 F.4th 64, from April  
20 of 2022.

21 The plaintiff has raised several contentions in  
22 support of his challenge. I've broken them out as, number one,  
23 the evidence does not support the light work RFC since it is  
24 based, in plaintiff's view, on the ALJ's interpretation of  
25 medical data in the face of what the plaintiff characterizes as

1 uncontested medical opinion of plaintiff's Nurse Practitioner;  
2 two, the plaintiff complains of the improper rejection of the  
3 medical source statements and opinions of Nurse Practitioner  
4 Little; three, the Administrative Law Judge, according to the  
5 plaintiff, improperly relied on, at and beyond step two, the  
6 prior administrative medical findings, or PAMFs, of state  
7 consultants; and four, because the hypothetical on which the  
8 vocational expert's testimony was based tracked a flawed RFC,  
9 the Commissioner failed to carry his burden at step five.

10           The backdrop, of course, is that it's well  
11 established now that the plaintiff bears the burden of proof  
12 through step four, including at the residual functional capacity  
13 stage, whereas the burden shifts to the Commissioner at step  
14 five to show that there is available work in the national  
15 economy in sufficient numbers that plaintiff is capable of  
16 performing.

17           Let me address the PAMFs issue first. It's a very  
18 interesting argument that was raised and I found it fascinating  
19 trying to wade through it. There are two PAMFs in the record,  
20 one from Dr. K. Gallagher, December 16, 2020, at pages 70  
21 through 77 of the Administrative Transcript, and the second from  
22 Dr. M. Kirsch, from March 4, 2021, pages 79 through 87 of the  
23 Administrative Transcript.

24           In neither case were those two physicians the  
25 examining adjudicator. In both, they found at pages 85 and 75

1 that the plaintiff does suffer from medically determinable  
2 impairments, but they are not severe.

3           The step two test, of course, is very modest. An  
4 impairment fails to reach the threshold of severity, which is  
5 what these doctors have found, where it does not significantly  
6 limit a plaintiff's physical or mental ability to do basic work  
7 activities, 20 C.F.R. Section 404.1522. And as I indicated  
8 during the oral argument, one of the two consultative  
9 non-examiners, Dr. Kirsch, specifically stated at page 85, "not  
10 severe - impairment or combination of impairments does not  
11 significantly limit physical or mental ability to do basic work  
12 activities." That is a quote from Dr. Kirsch's opinion.

13           There doesn't seem to be any controversy that the  
14 PAMFs in this case, Dr. Kirsch and Dr. Gallagher's opinions are,  
15 in fact, PAMFs, 20 C.F.R. Section 416.913a(5), which defines a  
16 prior administrative medical finding as, "a prior administrative  
17 medical finding is a finding, other than the ultimate  
18 determination about whether you are disabled, about a medical  
19 issue made by our Federal and State agency medical and  
20 psychological consultants at a prior level of review in your  
21 current claim based on their review of the evidence in your case  
22 record."

23           The plaintiff has raised, I thought, an interesting  
24 argument arguing that the Administrative Law Judge is not  
25 permitted to rely on such a PAMF. And I admit that there could

1 be, at first blush, ambiguity. 20 C.F.R. Section 416.920b(c)(2)  
2 would seemingly suggest that statements about whether or not a  
3 claimant has a severe impairment is inherently neither valuable,  
4 nor persuasive. However, when you -- and that certainly gives  
5 room for pause, but 20 C.F.R. Section 416.913a, which addresses  
6 evidence from Federal or State agency medical psychological  
7 consultants, suggests that the existence and severity of  
8 impairments about medical issues are properly addressed by a  
9 State agency medical or psychological consultant. And  
10 subsection (b)(1) of that provision states, "Administrative Law  
11 Judges are not required to adopt any prior administrative  
12 medical findings, but they must consider this evidence according  
13 to Sections 416.920b, 416.920c, and 416.927, as appropriate,  
14 because our Federal or State agency medical or psychological  
15 consultants are highly qualified and experts in Social Security  
16 Disability evaluation."

17 This is reiterated in a now rescinded Social Security  
18 ruling, but, nonetheless, I took it into account, SSR 96-6p,  
19 which suggests similarly that Administrative Law Judges are  
20 required to consider the findings of fact about the nature and  
21 severity of an individual's impairment as opinions of  
22 non-examining physicians and psychologists. It's interesting  
23 because that was allegedly replaced by SSR 17-2p, which actually  
24 doesn't speak to step two, but does speak to step three, but,  
25 nonetheless, I think it applies by analogy the new medical

1 regulations embodied in 20 C.F.R. Section 404.1520c, and which  
2 apply in the case, also addresses consideration of prior  
3 administrative medical findings.

4           As both sides have pointed out, this issue was  
5 exhaustively addressed by one of my fellow magistrate judges to  
6 whom, ironically, this case was originally assigned, Magistrate  
7 Judge Christian Hummel, in *Loni S. v. Commissioner of Social*  
8 *Security*, 2023 WL 4195887. It was dated June 27, 2023.  
9 Ultimately, Judge Hummel analyzed both the regulations and the  
10 Program Operations Manual System, or POMS, of the Commissioner  
11 and found that they both suggest that PAMFs, including opinions  
12 regarding the severity of an impairment, are properly  
13 considered, and one of the reasons is that the consultants are  
14 defined as part of the -- they're actually the Commissioner's  
15 agents and they're part of the adjudicative team, so the  
16 prohibition on considering whether an impairment is severe  
17 speaks to a matter reserved to the Commissioner doesn't apply to  
18 those consultants. The cases make it clear that state agency  
19 consultants are highly qualified experts in disability  
20 evaluation and although they are non-examining typically, their  
21 opinions are still entitled to strong consideration. The case  
22 law still supports that, as well as 20 C.F.R. Section  
23 416.913a(b) (1).

24           So a PAMF like those in this case do not bind the  
25 Administrative Law Judge, but should be considered. And, of

1 course, it is proper, in fact, to rely on such a PAMF, *Michael*  
2 *K. v. Commissioner of Social Security*, 2022 WL 3346930 from the  
3 Second Circuit, Western District of New York, August 12, 2022.  
4 So I don't find any error in reliance upon the prior  
5 administrative findings in part to support the RFC, which leads  
6 me to the second argument, residual functional capacity.

7           An RFC represents a range of tasks a claimant is  
8 capable of performing notwithstanding his or her impairments and  
9 that represents, in turn, a claimant's maximum ability to  
10 perform sustained work activities in an ordinary setting on a  
11 regular and continuing basis, meaning eight hours a day for five  
12 days a week, or an equivalent schedule. And, of course, an RFC  
13 determination is informed by consideration of all the evidence  
14 of record, including medical evidence.

15           The ALJ in this case concluded that plaintiff is  
16 capable of performing light work with some modifications. Light  
17 work is defined in 20 C.F.R. Section 404.1567(b) as involving  
18 lifting no more than 20 pounds at a time with frequent lifting  
19 or carrying of objects weighing up to 10 pounds. It requires a  
20 good deal of walking or standing, or when it involves sitting  
21 most of the time with some pushing and pulling of arm or leg  
22 controls.

23           The RFC in this case is based on the prior  
24 administrative medical findings and plaintiff's testimony. It  
25 is clearly more limited than the prior administrative medical

1 findings, but it is proper to rely on PAMFs of non-examining  
2 state consultants, *Lisa C. v. Kijakazi*, 2022 WL 2105853 from the  
3 Northern District of New York, June 10, 2022.

4 I found this case, as the Commissioner has argued, to  
5 be extremely similar to *Ryan W. v. Commissioner of Social*  
6 *Security*, 2022 WL 813934 from the Northern District of New York,  
7 March 17, 2022, from Magistrate Judge Daniel Stewart. Similar  
8 to this case, in that instance, the PAMFs found no limitations,  
9 the RFC was a light work RFC, and the Administrative Law Judge  
10 found more restrictions based on plaintiff's testimony.  
11 Magistrate Judge Stewart found no error in that respect.

12 In this case, as I indicated, PAMFs found no  
13 limitation in the ability of perform basic work functions. The  
14 Administrative Law Judge concluded that based on plaintiff's  
15 subjective testimony, he, in fact, experienced greater  
16 limitations. That does not error constituting remand, *Ivey v.*  
17 *Commissioner of Social Security*, 2020 WL 5046261, Western  
18 District of New York, August 27, 2020.

19 In this case, the RFC and the reason for adopting the  
20 RFC were explained by the Administrative Law Judge at pages 15  
21 to 17 of his decision. It was based on the prior administrative  
22 medical findings, plaintiff's extensive ADLs, activities of  
23 daily living, and the fact that he is physically active, walking  
24 four miles several times per week and biking long distances, as  
25 well as based on imaging which showed only mild degenerative

1 disc disease of the lumbar spine and changes, normal cardio  
2 exams, and I reviewed carefully the medical records and found  
3 that normal cardio findings and reports were recorded on  
4 multiple occasions, 563, 388, 400, 415, 422, 429, 440, 448, 456,  
5 464, 471, 481, and 487, among others.

6           There's negative stress test results from August 2019  
7 and February 2021, plaintiff's denial of cardio and back  
8 symptoms and shortness of breath on several occasions, and  
9 physical exams without significant cardiac findings, so I find  
10 that the residual functional capacity determination is supported  
11 by substantial evidence.

12           In terms of evaluation of the medical opinions, as  
13 the Commissioner has pointed out, this case, the application of  
14 which was filed after March 27, 2017, is subject to the amended  
15 regulations set forth in 20 C.F.R. Section -- I can't put my  
16 hands on it. I gave you the cite earlier. And under those  
17 regulations, the Commissioner no longer gives deference or  
18 specific evidentiary weight, including controlling weight, to  
19 any medical opinions. Instead, the ALJ must articulate and  
20 explain how he or she considered the factors of supportability  
21 and consistency and must consider various other factors which  
22 are not required to be elaborated.

23           In this case, the opinions include the prior  
24 administrative findings at (1)(a) and (2)(a), which we've  
25 already discussed. The Administrative Law Judge found them to



1 be somewhat persuasive and explained at 15 to 16 why that is.  
2 He then went on to address Nurse Practitioner Little's opinions,  
3 and there were two. One is from December 14, 2020. It appears  
4 at 508. It merely states Nurse Practitioner Little's diagnosis  
5 and then goes on to say, quote, "I have recommended he not  
6 return to work as his medical condition is very complicated and  
7 work related stress has caused deterioration to his overall  
8 health." The opinion does not speak to any particular  
9 functions. The Administrative Law Judge determined that it was  
10 less persuasive and discussed the reasons for that at pages 16  
11 and 17 of the Administrative Transcript.

12           It's not a particularly useful opinion and it speaks  
13 to an issue that is specifically reserved to the Commissioner,  
14 20 C.F.R. Section 404.1520b(c)(3)(i), which states that we will  
15 not provide any analysis about how we considered such evidence  
16 in our determination. Evidence that is inherently neither  
17 valuable, nor persuasive, includes statements on issues reserved  
18 to the Commissioner and statements that you are not disabled,  
19 blind, able to work, or able to perform regular or continuing  
20 work. In any event, I find no error in the analysis of that  
21 opinion.

22           The second opinion from Nurse Practitioner Little  
23 appears at pages 518 through 520 of the Administrative  
24 Transcript. Undeniably, it is work preclusive. For example, it  
25 finds that the plaintiff would be off task between 20 and

1 33 percent of the day and absent more than four days per month.  
2 It also includes a two-hour limitation on standing and walking  
3 in an eight-hour workday and it includes a limitation on lifting  
4 that is inconsistent with light work.

5           The Administrative Law Judge addressed this opinion,  
6 as well, and found it less persuasive. This is at page 17. I  
7 thought the explanation could have been more fulsome, but when I  
8 read the Administrative Law Judge's decision as a whole, I don't  
9 find any error in evaluating this. Pursuant to the new  
10 regulations, one of the bases for rejecting it is the  
11 Administrative Law Judge's observation that there's no support  
12 given and cited for the opinions. And I recognize -- I'm  
13 painfully familiar with the *Colgan* decision, but, nonetheless,  
14 it is a proper consideration that a medical opinion is  
15 conclusory and not supported by a reference to such things as  
16 observations during exams, test results, and so forth, *Sandra M.*  
17 *v. Commissioner of Social Security*, 2023 WL 4972707 from the  
18 Northern District of New York, August 3, 2023. And I note that  
19 it is not uncontested, as the plaintiff argues, that it is  
20 inconsistent with, in fact, the two prior administrative medical  
21 findings.

22           In conclusion, in reading the decision as a whole,  
23 again, I find no error in the evaluation of Nurse Practitioner  
24 Little's opinions. At step five, the argument is premised and  
25 hinges on a finding that the hypothetical and RFC are not

1 supported, an argument that I rejected. I find that the  
2 Commissioner has carried his burden at step five.

3 So in sum, I will award judgment on the pleadings to  
4 the defendant, order dismissal of plaintiff's complaint, and the  
5 entry of judgment to that effect.

6 Thank you so much for your arguments and presenting  
7 this case. It was interesting. I hope you have a good day.

8 MR. GORTON: Thank you, your Honor.

9 MR. PETERS: Thank you, your Honor.

10 (Time noted: 2:52 p.m.)

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CERTIFICATE OF OFFICIAL REPORTER

I, HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR, Official U.S. Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 28th day of May, 2024.

s/ Hannah F. Cavanaugh

HANNAH F. CAVANAUGH, RPR, CRR, CSR, NYACR, NYRCR  
Official U.S. Court Reporter